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PROJECT NO. 51830

REVIEW OF CERTAIN RETAIL	§	PUBLIC UTILITY COMMISSION
ELECTRIC CUSTOMER	§	
PROTECTION RULES	§	OF TEXAS

**OFFICE OF PUBLIC UTILITY COUNSEL’S REPLY COMMENTS
ON COMMISSION’S PROPOSAL FOR PUBLICATION**

The Office of Public Utility Counsel (“OPUC”) respectfully submits these reply comments on the Proposal for Publication approved by the Public Utility Commission of Texas (“Commission” or “PUC”) on July 29, 2021. OPUC’s reply comments are in response to the comments filed by Alliance for Retail Markets (“ARM”), Coalition for Competitive Retailers (“CCR”), Evolve Retail Energy, LLC d/b/a as Octopus Energy (“Octopus Energy”), Texas Energy Association for Marketers (“TEAM”), Texas Legal Services Center/AARP (“TLSC/AARP”) and TXU Energy (“TXU”) on August 27, 2021. The Proposal for Publication requests reply comments on the proposed rule by September 7, 2021. These comments are timely filed.

OPUC’s reply comments:

1. Disagree with ARM, TEAM, and CCR that a safety net for consumers is not warranted;
2. Agree with TLSC/AARP that indexed products should not be offered to residential or small commercial consumers; and recommend the commission prohibit all indexed products for residential and small commercial customers;
3. Disagree with CCR that products with ancillary services pass through charges should be allowed for residential and small commercial customers;
4. Recommend the Executive Director of the commission be allowed to designate additional voluntary retail electric providers (“VREPs”) during an emergency, with priority given to VREPs who were designated during the statutory process;
5. Disagree with TEAM’s recommendation to alter the POLR formula;
6. Agree with TEAM that ancillary service charges have not been permitted to be passed through to customers on fixed rate products. OPUC provides reference to the Commission Order where that is explicitly stated;

7. Are indifferent to whether the proposed changes to the definition of fixed rate products are adopted. OPUC believes the rule is already clear that ancillary service charges are not permitted to be passed on to customers on fixed rate products; and
8. Disagree with CCR that the commission is adopting changes outside of HB 16. The commission is within its authority to further limit the products that can be offered to residential and small commercial customers at any time.

I. RESPONSES TO COMMISSION QUESTIONS ON THE PROPOSED RULE

The Proposal for Publication requested comment on the following questions:

1. *Should the maximum rate for provider of last resort service that is charged by a large service provider to a residential customer in proposed §25.43 (m)(2)(A)(iii) and small and medium non-residential customers in proposed §25.43 (m)(2)(B)(iv) include a safety threshold to prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis? If so, what is an appropriate safety threshold?*

OPUC reiterates its position that the POLR rate should be the lesser of the price generated by the POLR formula or percentage increase on a year-to-year basis to protect residential and small non-residential consumers from overwhelming rate shock¹. OPUC certainly shares the concerns propounded by TLSC/AARP that the establishment of percentage level could set a de facto automatic increase level,² which is why OPUC proposed in its initial comments to use the lesser of a flat percentage increase or the current formula increase.³ OPUC believes that until a better solution is put forward, a safety net is warranted.

ARM, TEAM, and CCR all put forth various arguments against any form of safety net for consumers on POLR plans.⁴ While OPUC understands that the POLR is intended to be a temporary solution,⁵ OPUC also believes that it is not intended to be a windfall profit for providers.

¹ OPUC Initial Comments at 2 (Aug. 27, 2021).

² TLSC/AARP Initial Comments at 5 (Aug. 27, 2021).

³ OPUC Initial Comments at 2.

⁴ ARM Initial Comments at 23 (Aug. 27, 2021). *See also* TEAM Initial Comments at 4 (Aug. 27, 2021); and CCR Initial Comments at 1 – 2 (Aug. 27, 2021).

⁵ *See* <https://www.puc.texas.gov/consumer/electricity/polr.aspx> (“The Commission has designated Providers of Last Resort (POLR) as a back-up electric service provider in each area of Texas open to competition. POLR service is relatively high-priced, due to the costs associated with planning and the risk of serving an uncertain number of

Therefore, OPUC reiterates its position that will still allow for a reasonable return to the POLR while protecting consumers from rate shock.⁶

2. *Do the acknowledgement of risk requirements in proposed 25.475 (c)(3)(G) and 25.475 (j) provide adequate customer protections for residential and small commercial customers that enroll in indexed retail electric products and retail electric products that allow for the pass-through of ancillary service charges? If not, should these products be prohibited for residential and small commercial customers?*

Octopus Energy and TEAM supported the continued allowance of indexed plans for residential and small commercial consumers.⁷ CCR also supported the allowance of plans that permit ancillary services to be passed through to residential and small commercial consumers.⁸ TLSC/AARP commented that few residential consumers possess the knowledge or the resources to monitor pricing in the Electric Reliability Council of Texas (“ERCOT”) market and even fewer understand ancillary service charges.⁹

OPUC disagrees with Octopus Energy, TEAM and CCR that indexed plans and plans with ancillary service pass through charges should be allowed for residential and small commercial customers. OPUC agrees with TLSC/AARP that few customers understand how to monitor indexed pricing and what it could mean for their electricity bills. OPUC further agrees with TLSC/AARP that many customers have difficulty understanding ancillary services. After the winter storm, OPUC was asked by several customers to explain what ancillary services were and to look through new contracts to see if the contracts allow the pass through of ancillary services. OPUC agrees that these charges are difficult for customers to understand, and it is difficult for residential and small commercial customers particularly to have a meeting of the minds on the

customers with uncertain electricity loads. POLR service is a safety net for customers whose chosen REP is unable to continue service. This service is intended to be temporary and used only under rare circumstances when a REP is unable to provide service, or when a customer requests POLR service.”).

⁶ OPUC Initial Comments at 2.

⁷ Octopus Energy Initial Comments at 3 (Aug. 27, 2021). TEAM Initial Comments at 4 – 5.

⁸ CCR Initial Comments at 2.

⁹ TLSC/AARP Initial Comments at 6.

contract they are entering into when the contract contains ancillary services pass through charges or index pricing.

II. REPLY COMMENTS ON REVISIONS TO 16 TEXAS ADMINISTRATIVE CODE “TAC” § 25.43

a. 16 TAC 25.43(i)

As a representative for residential and small commercial consumers, OPUC supports the ability of the Executive Director of the Commission to designate additional VREPs and the inclusion of multiple competitors working to provide the best price possible for consumers, as long as the subsequent companies added to the VREP list have met the same criteria as those already listed.¹⁰ However, OPUC also understands the concerns of TXU regarding the risks associated with taking on the responsibility of being a VREP early in the process.¹¹

OPUC notes that the final provider list for 2021, currently on the Public Utility Commission of Texas website, lacks any VREP in the large non-residential service areas.¹² OPUC believes that allowing for the inclusion of additional VREPs could close some of these gaps and allow for additional coverage.

OPUC therefore recommends a flexible process, allowing for additional designations by the Executive Director of the PUC, like that envisioned in currently proposed 16 TAC §25.43(i) but one that also contains a priority designation for VREPs that join the list through the regular process, rather than through designation. OPUC believes that a priority designation, giving VREPs that go through the regular certification process the right of first refusal to act as VREP for a certain area or batch of consumers where there is overlap in service territory with a later-added VREP, appropriately balances the desire for more participating VREPs with the reward for risks taken by VREPs who choose to participate through the regular VREP certification process.¹³

¹⁰ <https://www.puc.texas.gov/consumer/electricity/POLR/FinalVREPlist.pdf>

¹¹ TXU Initial Comments (Aug. 27, 2021).

¹² <https://www.puc.texas.gov/consumer/electricity/POLR/FinalVREPlist.pdf>

¹³ 16 TAC § 25.43 (g) – (i).

b. 16 TAC 25.43 (m)(2)(A) and (B)

OPUC opposes the recommendation by TEAM to alter the POLR formula.¹⁴ TEAM's proposal would increase the rates paid by those who, often through no fault of their own, are forced into service from a POLR. The POLR is designed to be a service safety net for consumers,¹⁵ not a profit-making machine for service providers. The current rule already allows for increases over average area real time settlement point prices, meaning that POLR rates will already likely exceed average prices for the area.¹⁶ As noted on the PUC's website POLR information page, POLR service is already a higher priced product in order to account for the risks taken on by providers.¹⁷ An additional increase in POLR rates is not appropriate because such an increase in rates serves to harm customers who bear no responsibility for ending up on a POLR plan. OPUC therefore recommends that the Commission reject the proposal by TEAM to alter the POLR formula.

III. REPLY COMMENTS ON REVISIONS TO 16 TAC § 25.475

a. 16 TAC § 25.475 (b)(5)

The proposed rule in § 25.475 (b)(5), changes the definition of fixed rate product to specifically list ancillary services as a recurring charge that cannot be passed through to customers on fixed rate products.¹⁸ CCR argued that this changes the current rule and effectively prohibits Retail Electric Providers ("REP") from passing through actual ancillary service charges and absorbing any deviations in ancillary service charges from the fixed amount it set as part of its generation costs.¹⁹ TEAM and ARM commented that ancillary services are already treated as

¹⁴ TEAM Initial Comments at 6 – 14.

¹⁵ See <https://www.puc.texas.gov/consumer/electricity/polr.aspx> ("The Commission has designated Providers of Last Resort (POLR) as a back-up electric service provider in each area of Texas open to competition. POLR service is relatively high-priced, due to the costs associated with planning and the risk of serving an uncertain number of customers with uncertain electricity loads. POLR service is a safety net for customers whose chosen REP is unable to continue service. This service is intended to be temporary and used only under rare circumstances when a REP is unable to provide service, or when a customer requests POLR service.").

¹⁶ 16 TAC § 25.43 (m)(2).

¹⁷ <https://www.puc.texas.gov/consumer/electricity/polr.aspx> ("POLR service is relatively high-priced, due to the costs associated with planning and the risk of serving an uncertain number of customers with uncertain electricity loads.").

¹⁸ Proposal for Publication with Amendments (Aug. 3, 2021) at 51.

¹⁹ CCR Initial Comments at 4.

recurring charges and have been included in price disclosures under the rule since adoption.²⁰ TEAM believed that making changes to the definition would create confusion.²¹ TEAM also stated that ancillary service no longer means what it used to mean, since ERCOT is using additional ancillary services as a substitute for increased reserves.²² ARM also opposed the addition of ancillary services to the term and believed ERCOT's procuring of ancillary service meets the definition of regulatory changes.²³ TEAM believes this type of change increases costs beyond a REP's control and should be able to be included in rates just like changes in the Transmission and Distribution Utilities ("TDU") tariffs or ERCOT System Administrative fee.²⁴

OPUC agrees with TEAM that ancillary services have been considered recurring charges since the PUC adopted the definition in Project No. 35768.²⁵ In response to commenters in Project No. 35768 the PUC Order approving the rule stated,

"The commission also clarifies that for the fixed rate product, ERCOT fees include fees approved by the commission and charged to loads, such as the ERCOT administrative fee and nodal fee (should it be charged to loads in the future). Under this definition, ERCOT fees would not include ancillary services, losses or unaccounted for energy charges or TRE penalties."²⁶

Clearly CCR is incorrect in its assumption that the PUC has allowed ancillary service charges to be passed on to customers on fixed rate products.²⁷ OPUC believes that regardless of whether the Commission makes the proposed changes to the definition, ancillary service charges are NOT allowed to be passed through to customers on fixed rate products. The only charges that are allowed to be passed through on fixed rate products are ones explicitly approved by the PUC,

²⁰ TEAM Initial Comments at 17. ARM Initial Comments at 13.

²¹ TEAM Initial Comments at 17.

²² TEAM Initial Comments at 19.

²³ ARM Initial Comments at 13-14.

²⁴ TEAM Initial Comments at 19.

²⁵ TEAM Initial Comments at 17.

²⁶ *Rulemaking to Relating to Retail Electric Providers Disclosures to Customers*, Docket No. 35768, Order at 33 (Feb. 24, 2009).

²⁷ CCR Initial Comments at 4.

i.e., Transmission and Distribution Utility rate changes and the ERCOT System Administrative Fee, or an actual change in a federal, State, or local law, that is beyond the REPs control. Changes to ancillary service fees do not fit any of these conditions and are explicitly prohibited from being passed through to residential and small commercial customers in the order approving the rule. Accordingly, changes in ancillary service charges are not allowed to be passed through on fixed rate product plans regardless of whether the PUC adopts the proposed changes to this rule.

b. 16 TAC § 25.475 (c)(3)(G)

CCR suggested this section be deleted in its entirety because it exceeds the scope of the provisions contained in HB 16.²⁸ As addressed in Question 2, OPUC believes that the legislature passed HB 16 because it saw consequences from wholesale price contracts for residential and small commercial customers in February. The legislature did not do a detailed analysis of all the types of products that could be marketed to customers and analyze the harm inherent in each one. OPUC believes this analysis should be conducted by the PUC. The PUC must look more broadly than the new law to see if there are other similar products that should also be prohibited or products for which special considerations should be given. OPUC believes that there are other wholesale-like products that could allow extreme price increases that should be prohibited for small commercial and residential customers. OPUC believes this is well within the PUC's scope of authority and disagrees with CCR that putting restrictions on or eliminating other types of indexed products is outside of the PUC's authority.

²⁸ *Id.* at 7.

IV. CONCLUSION

OPUC appreciates the opportunity to provide these reply comments on the Proposal for Publication and looks forward to working with Commission Staff and other stakeholders in this project.

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Respectfully submitted,

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